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in the
Supreme Court
of the
United States

October Term 1969

No. 1146

AMERICAN ART INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner herein respectfully moves this Court for an order vacating its denial of the petition for writ of certiorari, entered on March 23, 1970. As grounds for this motion the petitioner states as follows:

1. THE EFFECT OF GOLDBERG v. KELLY, 90 S. Ct. 1011 UPON THE RULE PRONOUNCED IN N. L. R. B. v. GISSEL PACKING COMPANY, 89 S. Ct. 1918, 395 U. S. 575.

While this cause was pending on appeal the Supreme Court, in **Gissel,** supra, announced its partial adoption of the rule in **Cumberland Shoe,** 144 NLRB 1268, but in so doing, cautioned against the "too easy mechanical application of the Cumberland rule." This Court, in **Gissel,** did not hold that majority status in all instances should be based upon signed authorization cards per se; indeed, the Court held that where a majority status was obtained as a result of coercion, such was illegal and indeed not a majority status. The instant case involves the obtaining of signatures on the cards through threats, coercion and even violence, as is pointed out in brief to the Court of Appeals for the Fifth Circuit and to this Court in its Petition and Reply filed in this Court; moreover, the record is clear that the persons executing the cards were Spanish-speaking, and not bilingual, and could not read nor write English nor understand the language on the cards.

The state court injunction was obtained as a result of this violence and is still in effect. Efforts to examine the witnesses and confront them with regard to the obtaining of cards as a result of violence were denied unto the petitioner by the trial examiner, an obvious erroneous ruling on the facts in this case.

In **Goldberg** v. **Kelly,** supra, this Court, in Syllabus 20-22, recited: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." **Goldberg** involving the right of welfare recipients to confront and **cross-examine** witnesses stands for the proposition that "where governmental action seriously injures an individual, and the reasonableness of the action depends upon fact finding, the evidence used to

prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." The Court, in **Goldberg,** supra, went on to say:

> "While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be perjurous or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment* * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where **administrative.** * * * actions were under scrutiny." (Emphasis supplied)

To be remembered is the fact that the agency involved here is one which does not permit a respondent the use of depositions or the production of documents prior to trial, or the divulgence of any exculpatory evidence as required by **Brady** v. **Maryland,** 373 U. S. 83, 83 S. Ct. 1194.

The decision sought to be reviewed is so shockingly wrong as to deny due process not only to the employer involved, but to its employees who do not and did not desire to be represented by the union involved here. In fact, it would be quite appropriate for the Court to hear and consider propriety of the wide latitude the Board has assumed in its denial unto respondent, petitioner here, of fundamental rights guaranteed by the Fifth and Sixth Amendments.

For the reasons above, therefore, the denial of certiorari should be reconsidered to the end that this case be heard and the law properly applied to the facts as contained in the record.

2. THE BANNON MILLS DOCTRINE AS ANNOUNCED BY THE BOARD HOLDING IN BANNON MILLS, INC., 146 N. L. R. B. 611.

In applying the rule announced in **Bannon Mills,** supra, to the facts of this case, the Board has applied a **rule of evidence** which the **Board** itself **has legislated,** and even so, has misapplied to the facts. The **Bannon Mills** doctrine constitutes now a rule of evidence peculiarly that of the Board and no other agency. Refusing to permit the president of respondent company to testify after he was exculpated from any wrongdoing by the Court of the United States District Court for the Southern District of Florida (**Foster** v. **Gilbert, et al.,** 264 F. Supp. 209) was to deny due process. Even in **Brown** v. **United States,** 359 U. S. 41, 79 S. Ct. 539, a matter involving enforcement attempt against the defendant for refusing to testify before a grand jury, the court, at page 546 held: "When the petitioner first refused to answer the grand jury's question, he was guilty of no contempt. He was **entitled to persist in his refusal** until the court ordered him to answer." In the action at hand **no effort was made to follow the statutory proceedings to require production of documents and testimony** and the action at bar differs from **Bannon Mills** in which no petition to revoke was filed. Even the original time cards and records produced by an employee other than the respondent president were denied admittance, for the apparent simple reason that they were not produced by the president of the company.

It is obvious that the Board's doctrine as announced in **Bannon Mills,** supra, will be the subject of much and future discussion and litigation. Certiorari should have been granted if only in order to resolve a recurring question involving the legitimacy of an agency legislating a rule of evidence, and then applying the same in any manner it so desires.

It is obvious that the application of **Bannon** under the facts here is violative of the holding in **Cursio** v. **U. S.,** 354 U. S. 118, 77 S. Ct. 1145, **Brussel** v. **U. S.** 90 S. Ct. 2 and **Spevack** v. **Klein,** 87 S. Ct. 625, 385 U. S. 511, for nothing was directed to Foster as an officer, director, representative or agent of the respondent company.

Rehearing should be granted here, if for no purpose other than to clarify the arguments advanced in the original Petition for Writ of Certiorari (see **Hickman** v. **Taylor,** 327 U. S. 808, 328 U. S. 876, 329 U. S. 495, and **Brinkerhoff-Faris Trust Co.** v. **Hill,** 280 U. S. 604, 550, 281 U. S. 673), but more importantly, should be granted to rectify an obvious erroneous ruling on the particular facts and for a determination of the authority of the National Labor Relations Board to legislate a rule of evidence.

3. THE BIAS OF THE TRIAL EXAMINER.

As stated in pages 10 and 11 the trial examiner, by some hokus pokus made a majority determination when there was a substantial conflict in evidence, the Fifth Circuit reciting (A: 7): "A review of the record demonstrates that there was a substantial conflict in the evidence with the version of facts presented by the company's witnesses conflicting with the version presented by the Board's witnesses." A large segment of the petitioner's

brief filed in the Court of Appeals for the Fifth Circuit dealt with the prejudice and bias of the trial examiner; the employer respondent, petitioner here, pointed out that the trial examiner clearly exceeded the fairness and propriety required of him, as stated in the cases of **N. L. R. B. v. Pittsburgh S. S. Co.**, 71 S. Ct. 453, **Universal Camera Corp. v. N. L. R. B.** 71 S. Ct. 456.[1] The Court's attention is called to pages 48 through 50 of that brief which are adopted as a part of this petition for rehearing. Moreover, it has specifically come to the attention of the employer, petitioner here, of bias that may well have resulted, and probably did result, by the mere fact that during this period of time the attorneys for the Board and trial examiners were organizing their own union and were union members. The effect of this upon actions and decisions of a trial examiner would be manifest, psychologically and otherwise, whether the examiner was himself a member of the union. Employer, petitioner, calls to the Court's attention two articles, one of which appeared in the Baltimore Sun on December 18, 1964, and the other in the Des Moines Register in January of 1965. The recitations contained in these articles became known to the petitioner subsequent to the denial of the petition for writ of certiorari, and, of course, long after the question raised in the Court of Appeals. They are as follows:

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[1]The decision sought to be reviewed, insofar as it relates to the improper conduct of the Trial Examiner, is in direct conflict with a Sixth Circuit case, to-wit: *Hagopian and Sons, Inc.* v. *N. L. R. B.* (1968), 395 F. 2d 947 in which the Sixth Circuit reversed the Board because of the Trial Examiner's refusal to allow respondent's counsel to develop his theory of the case. In *Hagopian* the Trial Examiner, as here, took over the hearing and generally did the things complained of in the case at bar. All the more reason for granting the petition, as is the fact that the decision by the Fifth Circuit here is in conflict with its own decision in *N. L. R. B.* v. *Phelps*, 136 F. 2d 562 . . . a complete lack of uniformity within the same circuit.

THE SUN,

NLRB, Union Of Attorneys Sign Bargaining Contract

Washington, Dec. 17 (AP)—The National Labor Relations Board officially became an employer, under principles of Federal labor law, in signing a collective bargaining contract with its own attorneys today.

Under the board's contract with the NLRB Professional Association, the lawyers will not have the right to call a strike.

Nor will they be able to bargain for wages, which are set by Congress.

"Not A Typical Contract"

"It's not a typical labor contract like those in private industry," said Charles Caffrey, president of the lawyers' union "It primarily covers career development such as transfers, assignments, regularized advancement, grievances and career opportunities."

Arnold Ordman, general counsel, signed for the board.

The association includes several hundred attorneys in the board's Washington offices. They deal with complaints, injunctions and appeals stemming from labor disputes.

Another organization, the National Labor Relations Board Union, soon also will begin negotiating a contract covering employees in regional offices around the country.

The board's recognition of the two unions initially prompted complaints from several congressmen who questioned the propriety of lawyers who deal with national labor policy belonging to a union themselves.

The board replied that its employees were given the right to organize and win exclusive recognition under a 1962 executive order issued by President Kennedy.

"The board did not have the right to refuse recognition," an NLRB spokesman said.

Nor did it help organize the two unions except to supervise representation elections, he said, adding: "It is illegal to assist a union. The whole thing reverts to the fact that there was an Executive order."

The executive order specifically forbids any union activity of Federal employees where a conflict of interest would be involved.

To avoid any possible conflict, the NLRB Professional Association agreed in the contract not to affiliate with the AFL-CIO or any other labor organizations with which it deals in Federal labor relations cases.

Both NLRB unions are completely independent, officials said.

Walter P. Armstrong, Jr., chairman of the standing committee on professional ethics of the American Bar Association, said the committee has not considered the question of possible conflict of interest in this case. "We've taken no position on it at all," he said in a telephone interview from Memphis, Tenn.

Nora Friel, outgoing president of the National Labor Relations Board Union, said in Cleveland that board employees want a contract for "the same reasons as anybody else—to deal with grievances, working conditions, overtime and other matters."

Lawyers Organize 'Union'

January, 1965

Bias in NLRB Cases

From the Des Moines *Register*

Several hundred lawyers and trial examiners employed on the staff of the National Labor Relations Board (NLRB) have taken a step that jeopardizes the standing of that agency as a fair and objective arbiter of labor disputes.

They have formed the NLRB Professional Assn. through which they will bargain with the board on matters of grievances, promotions, assignments, transfers and career opportunities. The NLRB has signed a contract with the association, saying that it was required to do so under an executive order issued by President Kennedy in 1962.

Calling the organization an association rather than a union is a subterfuge. The association will be the exclusive bargaining agency for attorneys employed by the board. The lawyers association will not have the right to bargain for wages or to strike, but in all other respects it will function as do trade unions. The fact that the association will not be affiliated with the AFL-CIO makes it no less a union than the independent United Mine Workers union or Jimmy Hoffa's Teamsters Union.

The danger involved in the NLRB lawyers' organization is that it casts doubts on the future objectivity with which disputes between employers and unions are handled.

Decisions in these cases rest finally with the five members of the board itself. However, most of the groundwork is performed by lawyers employed by the commission. The lawyers conduct the hearings in disputes between labor and management. They have wide latitude in determining what testimony and evidence will be heard. They evaluate the evidence. They make recommendations to the board. They can and do influence the facts and evidence brought to the board's attention.

The quasi-judicial nature of the NLRB and its proceedings offers many opportunities for prejudicial action without the protection for parties to a dispute that exists when cases are taken to court.

It will be difficult henceforth for any employer having a case before the board to feel that the NLRB lawyers and examiners will be able to handle it with complete objectivity. They would be as much justified in having those fears as members of the trucking industry would be if lawyers for the Interstate Commerce Commission belonged to the Association of American Railroads.

The public generally would soon lose confidence in the courts if judges did not disqualify themselves from presiding over cases in which they have any personal prejudice, interest or commitments. The same situation is true with respect to the NLRB, if the lawyers who handle cases are affiliated with an organization that is for all practical purposes a labor union.

The National Labor Relations Board, whose members are political appointees, has never achieved the solid reputation for unbiased judgment that has been accorded the courts. The action of its staff lawyers in forming an association and insisting on rights and privileges comparable to those of labor unions raises a still higher hurdle to the board achieving such a reputation.

The action of the staff layers of the NLRB should prompt Congress to undertake a long-needed review of the procedures before this agency, and the extent to which the parties to disputes before the NLRB are assured of equitable and objective consideration.

Respondent is now led to believe that the members of the staff of the Regional Director of the Twelfth Region, in the investigation of the charge and the issuance of the complaint in the instant case, may well have been and/or are members of a labor organization, as well as the Trial Examiner hearing the complaint and making the decision herein; and, if this fact be true, a conflict of interest exists within the Agency charged with the impartial enforcement of the Act which could only result in prejudice to a fair, objective and unbiased investigation and trial and decision of the matters in issue to the extent that the respondent, petitioner here, was denied due process of law.

Petitioner was thereby deprived of its right to the fairness required by law.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, the Reply to the Memorandum for the National Labor Relations Board in Opposition, and the certified Brief filed in the Court of Appeals for the Fifth Circuit, the petitioner prays that this Court grant rehearing of the order of denial, vacate said order, and grant petition and review the Judgment and Opinion below.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

Counsel certifies that the above Petition for Rehearing was presented in good faith and not for delay and the Petition is restricted to the grounds set out in the Petition above.

JOSEPH A. PERKINS